In the Supreme Court

of the United States

OCTOBER TERM, 1951

No. 539

ROBERT O. NORMAN,

Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

ARGUMENT

The soundness of any judicial utterance lies in its reasoning. Here is the core of the reasoning of the decision of court below in case at bar: "In view of the modern policy of administrative compensation for accidents, it would seem that no distinction should be cre-

ated between construction work done by this established contractor in building a railroad bridge and in building an office tower. Just because his employer happened by chance to be building a railroad bridge instead of an office building is no reason for permitting plaintiff to gamble upon the windfall of a heavy verdict or the disaster of no recovery simply because he was incidentally working on railroad bridge construction. Nor, on the other hand, is it sound public policy, if he lost in such gamble, to permit him to fall back into the safety net of the Workmen's Compensation Act." (R. 7-8). The reasoning of Mr. Justice Douglas in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 87 L. Ed. 1444, to the contrary notwithstanding.

The Appellate Court of Illinois, in *Downs v. B. & O. R. Co.*, 102 N.E. 2d 537, Jan. 16, 1952, lays down the last word on the question submitted to this Court by Petitioner Norman. There Downs sued the Railroad for injuries sustained in the course of his employment by an independent contractor unloading ore from a boat for transfer to Railroad's cars at a lake port. Court held that the dock company was a MERE AGENCY of the Railroad—not an independent contractor—so that plaintiff was Railroad's employee and that plaintiff was engaged in interstate commerce at the time and place of the accident.

In the *Downs* case the plaintiff and defendant respectively took the exact positions taken by Norman and the Railroad in case at bar. The Court after stating concisely and clearly the facts and the law, thereupon proceeded to analyze the many decisions of this Court

and others including most of the cases cited by petitioner and respondent in case at bar.

With respect to the position taken by the Railroad in the *Downs* case, similar if not the same as that of respondent in case at bar, the Court pointed out the vice of the Railroad's position and distinguished upon the facts in the cases the Railroad cited.

By this reference the petitioner herein adopts as his Reply Brief to Respondent's Brief, the decision in the case of *Downs v. Baltimore & Ohio R. Co.*

Let us now analyze the case respondent asserts as the law of this case—*C. R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 60 L. Ed. 735, and where the Court said:

> "Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

This case arose in 1915 and very likely if considered now or at any time since the 1939 Amendment would be against respondent. In the *Bond* case the Railroad was in the position where it could in fact turn over the work in question to Turner and allow him to carry on the work as an independent contractor. In the work Turner could have carried on his job 24 hours of the day without any interference with operation of the trains and the commerce of the Rock Island Railroad. That is to say, the freedom of action of the Rock Island was in no way curtailed and the statute as interpreted at that time has no application to the situation as of the present time

or at any time since the 1939 Amendment. But eliminating the 1939 Amendment entirely, the *Bond* case as it is called, is no criterion for the case at bar. In case at bar, Railroad could not grant to the construction company the freedom of action that the Rock Island granted to decedent. Respondent was, by its franchise with the state in carrying on its interstate commerce, bound to keep itself in the position where it could control the bridge and could use it in its daily interstate commerce, which in fact it did use, and Gilpin Construction Company subordinated its work to the operation of the trains of respondent and observed the train orders of respondent issued from day to day in the operation of its trains over the trestle in question. Respondent was in duty bound by its franchise to maintain and keep in repair its instrumentalities used by it in its interstate commerce. This was an essential function which it could not delegate to anybody. Neither the Rock Island nor respondent in 1915 or in 1947 could have delegated to an independent contractor the repair of the tracks and trestles used by them in interstate commerce.

It is rather interesting in reviewing the *Bond* case to refer to *Kamboris v. O. W. R. & N.*, 75 Ore. 358, decided in 1915 by the Supreme Court of Oregon, dealing with the same subject as by the Supreme Court of Oklahoma in the *Bond* case. Be it said to the credit of the Oregon Court that it laid down the law in 1915 which has been the law everywhere since the 1939 Amendment.

The *Bond* case and *Casement v. Brown,* 148 U.S. 615, and like authorities, are disposed of by *Atlantic*

Coast Line v. Tredway (120 Va. 735, 10 A.L.R. 1411, certiorari denied 248 U.S. 670), in the following language:

> "They are inapplicable to the instant case, for the reason that the duties of the servant in question were of such a character, as above noted, that they could not be assigned by the defendant to an independent contractor so as to release itself from the position of responsibility for their proper discharge. That is to say, the defendant could not abdicate its position of master with regard to the plaintiff's intestate in the instant case, by delegating or assigning its duty of control of such servant to any independent contractor. It is not a case in which the doctrine of independent contractor is applicable. See authorities collated in note to 66 L.R.A. pp. 119, 136, 137, 140, 142; Boucher v. New York, N. H. & H. R. Co., supra, 13 L.R.A. (N.S.) 1177, and authorities collated in note thereto."

Respondent cites *Bibb's, Adm'r. v. Railroad,* 87 Va. 711, as authority for the right of a common carrier to delegate the duty of the repair of its trestles used by the common carrier in interstate commerce. That case was decided in 1891, and in truth the facts are similar to case at bar in that contractor Smith was building a bridge for the Railroad. Bibb was an employee of Smith. A heavy train approached the trestle and contractor Smith signaled it to proceed. It did, bridge broke, and Bibb was killed. The Court held that the work was not inherently dangerous and neither it nor the results of its building were nuisances in themselves. So Bibb's, Adm'r. could not recover against the Railroad. Perhaps it is decisions of this kind that brought about the enactment of the Federal Employers' Liability Act.

In *Thomas, et al. v. West Jersey R. Co.*, 101 U.S. 71, 25 L. Ed. 750, Court said:

> "Where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

Respondent cites cases like *Wells Fargo v. Taylor* (an express messenger), *Robinson* (a Pullman porter) *v. B. & O., Gaulden* (a refrigeration mechanic) *v. S. P. Co.* Cases that have no place in dealing with questions under the Federal Employers' Liability Act because Taylor, Robinson, Gaulden and their kind were not employed by or doing the work of a "common carrier by Railroad",—the only kind of common carrier covered by the Federal Employers' Liability Act. The dividing line is: Railroading in its true sense vs. New fields, i.e., furnishing of facilities or services. The repair of a railroad trestle and the tracks thereon is railroading in its true sense and such persons doing said work are engaged in interstate commerce.

It is therefore urged that the Writ prayed for be allowed.

Respectfully submitted,

ELTON WATKINS,
Attorney for Petitioner.